

IT-09-92-T
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03 July 2012

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International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia since 1991

Case No. IT-09-92-T
Date: 3 July 2012
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Bakone Justice Moloto
Judge Christoph Flügge

Registrar: Mr John Hocking

Decision of: 3 July 2012

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION WITH REGARD TO PROSECUTION MOTION
FOR ADMISSION INTO EVIDENCE OF WITNESS
HARLAND'S STATEMENT AND ASSOCIATED DOCUMENTS**

Office of the Prosecutor

Mr Dermot Groome
Mr Peter McCloskey

Counsel for Ratko Mladić

Mr Branko Lukić
Mr Miodrag Stojanović

I. PROCEDURAL HISTORY

1. On 1 May 2012, the Prosecution filed a motion requesting admission of one witness statement and 35 associated documents in relation to Witness Harland.¹ The Defence responded on 15 May 2012.² The Prosecution requested leave to reply on 22 May 2012, attaching its reply.³ On 30 May 2012, through an informal communication, the Chamber granted the Prosecution leave to reply.⁴

II. SUBMISSIONS OF THE PARTIES

2. The Prosecution submits that Witness Harland's evidence relates to "each of the four primary components of the Indictment" and that he personally met with Ratko Mladić.⁵

3. The Defence raises five objections to Witness Harland's proffered evidence. First, the Defence opposes the Motion because by tendering associated documents, the Prosecution fails to comply with the Chamber's guidance on this issue.⁶ Secondly, the Defence submits that the Prosecution should be ordered to redact those portions of the witness statement which the Prosecution indicated it will not rely upon.⁷ Thirdly, the Defence objects stating that the witness expressed expert opinions in his statement and argues, as such, that the procedure of Rule 94 *bis* of the Rules should be followed.⁸ Fourthly, the Defence opposes the inclusion of incomplete citations of documents in the statement.⁹ Lastly, the Defence argues that the subject matter to be covered by the witness is so significant that the witness should be brought *viva voce*.¹⁰ The Defence also indicates that it will require more time for cross-examination and that it reserves the right to conduct a full cross-examination "without limitation".¹¹

¹ Addendum to Prosecution 92 *ter* Motion: RM505 (David Harland), 1 May 2012 ("Motion"). The Chamber notes that this filing followed earlier litigation in relation to a Rule 92 *ter* application for this witness. In this earlier litigation, the Prosecution requested leave to amend the Rule 65 *ter* summary for this witness. Considering that the Defence did not object to this request and that it was provided with the amended Rule 65 *ter* summary on 3 April 2012, the Chamber accepts the amended Rule 65 *ter* summary for Witness Harland.

² Defence Response to Prosecution Rule 92 *ter* Motion: RM505 (David Harland), 15 May 2012 ("Response").

³ Prosecution Request for Leave to Reply and Reply to Defence Response to Prosecution Rule 92 *ter* Motion: RM505 (David Harland), 22 May 2012.

⁴ Through informal communications, the Chamber also extended response deadlines and granted 15 requests for leave to reply in relation to some of the other pending Rule 92 *ter* motions.

⁵ Motion, para. 4.

⁶ Response, paras 4-9.

⁷ Response, paras 10-12. This amounts to 84 paragraphs or portions thereof, see Motion, para. 8.

⁸ Response, paras 13-16.

⁹ Response, paras 17-20.

¹⁰ Response, paras 21-24.

¹¹ Response, para. 9, Conclusion.

III. APPLICABLE LAW

4. Rule 92 *ter* of the Tribunal's Rules of Procedure and Evidence ("Rules") provides in relevant part that a Trial Chamber may admit the evidence of a witness in the form of a written statement under the following conditions: (i) the witness is present in court; (ii) the witness is available for cross-examination and any questioning by the Judges; and (iii) the witness attests that the written statement accurately reflects that witness's declaration and what the witness would say if examined.

IV. DISCUSSION

5. In general, the Chamber understands Rule 92 *ter* motions to be instruments notifying the opposing party and the Chamber of evidence to be presented in written form. The opposing party prepares for the witness's testimony on the basis of the Rule 65 *ter* summary, but also on the basis of a Rule 92 *ter* motion. As a general rule, the opposing party should prepare for a witness's testimony assuming that the witness's full statement will be admitted into evidence. The Chamber cannot decide on the admission of a witness statement under Rule 92 *ter* of the Rules until all of its requirements have been met. The requirements of Rule 92 *ter* can only be met once the witness appears in court and attests to the accuracy of his statement. Regardless of this, the Chamber will decide on a few of the Defence's objections already now. The below discussion is specific for the Defence objections to the statement of Witness Harland, but also contains the Chamber's general approach to some issues which may be applicable to other Rule 92 *ter* motions.

6. In relation to the first objection, the Chamber notes that on 19 June 2012, it provided the parties with a courtesy copy of its Additional Clarification and Amendment of the Guidance on the Tendering and Presentation of Evidence. This decision will be read into the record in due course. It addresses the Defence's objection on this ground. Nonetheless, the Prosecution was expected, and is hereby reminded, to review whether all associated documents need to be tendered and also whether any of the proffered evidence overlaps with adjudicated facts of which the Chamber has taken judicial notice. The Chamber expects an update on these issues by the time the witness appears in court.

7. In relation to the second objection, the Chamber refers to its previous guidance on this issue.¹² As was expressed there, it is illogical to tender and/or admit evidence that is expressly identified as not to be relied on. Accordingly, the Prosecution is instructed to redact those

¹² T. 205.

paragraphs and portions of the witness's statement upon which it indicated that it does not intend to rely.

8. In relation to the third objection, the Chamber expects that proposed fact witnesses provide testimony describing their observations and factual knowledge of events. The Chamber further expects the parties to only elicit factual testimony from such witnesses. Nevertheless, proposed fact witnesses often also provide conclusions or opinions.¹³ This occurs when testifying in court as well as in written statements. In such situations, the Chamber expects the parties to explore such conclusions or opinions with a view to eliciting a clear basis for them, unless such a basis is already apparent from the written statement.¹⁴ If such conclusions or opinions are not further explored, or the witness is unable to provide a clear basis for them, they remain unsupported, un-sourced conclusions or opinions of a witness. As a result, absent any other corroborating evidence, the Chamber will not give any weight to such opinions or conclusions but will not require that the transcript or statements be redacted. Even if such conclusions or opinions are further explored or if the witness provides a basis for them, whether in court or in a written statement, it remains the Chamber's decision whether to follow such conclusions or opinions when assessing the evidence in its entirety.¹⁵ Therefore, paragraphs 5, 21, 32-34, 36-40, 68-71, 88, 93, 96, 125, 169-170, 182, 204, 214-215, 230-233, 260, 276-278, 291, and 296 do not need to be redacted as requested by the Defence.¹⁶ However, to avoid any misunderstanding, the Chamber specifically draws the parties' attention to footnotes 14 and 15 of this decision.

9. In relation to the fourth objection, the Chamber considers that the Defence has the opportunity to further explore specific matters contained in the statement or contextualise them, if needed. This is not affected by the use of Rule 92 *ter*.

¹³ In this context, the Chamber notes that for a number of proposed fact witnesses, the Prosecution has acknowledged that some of their opinions are based on expert knowledge (see p. 214 of the Prosecution's witness list of 10 February 2012 in relation to medical professionals who treated sniping and shelling victims). The Chamber expects that if the Prosecution seeks to elicit opinions based on witnesses' apparent expertise, the Defence will be given sufficient notice pursuant to Rule 94 *bis* of the Rules, in order to be able to challenge such opinions or conclusions. Furthermore, the parties should clearly announce in related motions or notifications that they intend to rely on expert conclusions of proposed fact witnesses.

¹⁴ See for example, paragraph 276 of the witness's statement which refers to "research" as a basis for the witness's conclusion, without further specifying that research.

¹⁵ For example, paragraph 260 of the witness's statement contains the witness's opinion on whether certain documents include Mladić's handwriting. Considering that no special expertise has been argued for this witness to make such an assessment and that the assessment seems to be merely based on a layman's comparison of different handwriting samples, the Chamber already indicates that it is unable to adopt these conclusions on the basis of the statement alone.

¹⁶ The Chamber further notes that the Defence sometimes confuses opinion evidence with factual evidence. For example, factually describing what was written in a contemporaneous report, even if it contained opinions, is not opinion evidence, see e.g. paras 182 or 215 of the witness's statement.

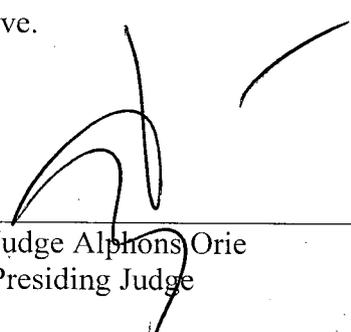
10. In relation to the fifth objection, the Chamber recognises that the significance of the proffered evidence may be a factor militating against admission under Rule 92 *ter*. Nonetheless, the Chamber will only very exceptionally disallow a party from using Rule 92 *ter* on this ground and will not do so for Witness Harland.

11. Lastly, it should be clear to the Defence that there is no such right as a cross-examination without limitation. In accordance with Rule 90 (F) of the Rules, the Chamber will exercise control over the presentation of evidence. Furthermore, the exact amount of time which will be available for cross-examination depends on many factors and may also be re-evaluated depending on how cross-examination develops. As such, the Chamber will not decide on any time for cross-examination at this stage.

V. DISPOSITION

12. For the foregoing reasons, the Chamber **DEFERS** its decision on admission of the proffered Rule 92 *ter* material of Witness Harland and **INSTRUCTS** the Prosecution to redact the statement in accordance with paragraph 7 above.

Done in English and in French, the English version being authoritative.



Judge Alphons Orié
Presiding Judge

Dated this Third day of July 2012
At The Hague
The Netherlands

[Seal of the Tribunal]